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No. 80-931.

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondents, Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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Question Presented.

Did the First Circuit Court of Appeals properly conclude that an impasse in collective bargaining negotiations alone does not justify unilateral withdrawal by a single employer from multiemployer bargaining?

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Statement of the Case.

The instant matter grows out of a charge filed with the National Labor Relations Board (hereinafter, "the Board") by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 25"). In that charge, Local 25 asserted that Charles D. Bonanno Linen Service, Inc. (hereinafter "Bonanno"), was engaged in unfair labor practices as defined by Sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158 (a)(5) and (1) by its refusal to execute the collective bargaining agreement negotiated by Local 25 and the New England Linen Supply Association (hereinafter, "the Association"), a group of ten employers including Bonanno (J.A. 92-93; P. 19-20).*

For some years, Local 25 negotiated collective bargaining agreements with the Association including the agreement that covered the period from September 21, 1972 through April 18, 1975. Throughout these years, Bonanno was a member of the Association for purposes of bargaining with Local 25 (*id.*). On or about February 19, 1975, Bonanno authorized the Association to bargain collectively on its behalf with Local 25 regarding an agreement to replace the agreement which was to expire on April 18, 1975 (*see* J.A. 93; P. 20). Negotiations for a successor agreement began in March of 1975, but by May 15, 1975, the parties reached an impasse on the issue of whether the salaries would be computed on a commission or an hourly basis (J.A. 94; P. 20).

On June 23, 1975, after repeated attempts to break the impasse, Local 25 instituted a selective strike against Bonanno which resulted soon after in the remaining Association em-

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* References marked "J.A." refer to the portions of the record contained in the Joint Appendix while those marked "P." refer to the decisions which are reprinted in the Petition for a Writ of Certiorari.

ployers locking out their union drivers (*id.*). Negotiations continued subsequent to the strike and lockout, and between June 23, 1975 and November 21, 1975, Bonanno, while under the protective umbrella of the lockout, hired permanent replacements for its striking employees (J.A. 94-95; P. 20).

On November 21, 1975, Bonanno, apparently dissatisfied with the strategy proposed by the Association for breaking the impasse (*see* J.A. 38-39, 76-77), notified the Association and Local 25 that it was withdrawing from the Association (P. 20). Local 25 continued to meet with the Association without Bonanno (J.A. 95; P. 21); however, on April 9, 1976, Local 25 filed the unfair labor practice charges out of which the instant controversy has grown. An agreement between Local 25 and the Association was reached on April 13, 1976, based on the union's acceptance of the Association's revised hourly wage offer; and subsequent thereto, Local 25 informed Bonanno by letter dated April 29, 1976, that the union at no time had consented to Bonanno's withdrawal and, therefore, Local 25 considered Bonanno to be a member of the Association and bound by the agreement reached (J.A. 95-96; P. 21).

The instant case originally came before the First Circuit Court of Appeals pursuant to an application of Bonanno under Section 10(f) of the National Labor Relations Act (hereinafter, "the Act"), 29 U.S.C. § 160(f), for review of the initial decision and order of the Board, 229 NLRB 629 (1977) (P. 53-71). Subsequent to the docketing of said application, the Board, *sua sponte*, decided to review and to reconsider the issues raised in this case and was granted leave by the First Circuit to withdraw the certified list. On August 6, 1979, the Board issued its Supplemental Decision and Order, 243 NLRB No. 140, and, thereafter, applied under Section 10(e) of the Act with the First Circuit for enforcement of that Decision and Order.

Summary of Argument.

Multiemployer bargaining, in certain contexts, is beneficial to both companies and unions and, more importantly, has been recognized by Congress as an effective means of achieving labor peace. However, since it is based, to a certain extent, on sacrifice and compromise, it is a fragile concept that will be abandoned by both sides if the benefits of same cannot be ensured through the severe restriction of nonconsensual withdrawals.

An impasse is an expected, commonplace and temporary part of collective bargaining negotiations. As such, linking nonconsensual withdrawal rights to the existence of an impasse would result in the Board's "unusual circumstances" exception to nonconsensual withdrawal subsuming the rule of nonconsensual withdrawal. Moreover, an impasse can be manipulated with the result that allowing withdrawal at impasse would sanction unfettered withdrawal rights, even though such rights clearly are antithetical to multiemployer bargaining.

In application, this Court's judicial review standards in cases involving multiemployer bargaining issues require that a reviewing court first determine the propriety of the legal foundation upon which the decision of the Board is based, and, thereafter, give the appropriate deference to the judgment of the Board unless that foundation is found to be erroneous.

As applied to the facts of the instant case, the Board was balancing (1) the preservation of the viability of multiemployer bargaining, since it perceived correctly that such bargaining, as a practical matter, would be destroyed if members of the unit were free to withdraw upon a bargaining impasse, and (2) what was viewed by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975), as an im-

balance of economic weapons. The Board, of course, struck the balance in favor of preserving the integrity of multiemployer bargaining, especially since this Court has admonished both the Board and the courts to refrain from becoming arbiters of the economic weapons which parties may use in seeking to gain acceptance of their bargaining demands. In any case, it is evident that the balance struck by the Board was based on a sound legal foundation and, as such, was entitled to deference.

Finally, as presently articulated, only the decision of the Third Circuit in *Beck* is inconsistent with that of the First Circuit below. However, the *Beck* decision is suspect as the court (1) makes itself an arbiter of economic weapons, (2) engages in a balancing of so-called "economic weapons" which is extremely imprecise, and (3) misperceives a bargaining impasse as an event which neither side can manipulate. Moreover, the Third Circuit in *Beck* has usurped impermissibly the Board's function of balancing conflicting interests.

Accordingly, while the decision of the First Circuit below is analytically sound, its counterpart in the Third Circuit is neither persuasive nor consonant with the appropriate standard of review.

Argument.

I. The First Circuit Court of Appeals Properly Concluded that an Impasse in Collective Bargaining Negotiations Alone does Not Justify Unilateral Withdrawal by a Single Employer from Multiemployer Bargaining.

Multiemployer bargaining has existed at least since the early 1800's when it was prominent in the anthracite coal industry.[1]

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[1] Pierson, *Multi-Employer Bargaining: Nature and Scope*, 8 (1949).

This type of bargaining increases the economic leverage of small businessmen and permits them to conserve scarce economic resources.[2] Moreover, as this Court has pointed out, multiemployer bargaining enables smaller employers to bargain "on an equal basis with a large union" and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957).[3] In addition, multiemployer bargaining is an effective means of counteracting the potential use by unions of whipsaw tactics.

Thus, without multiemployer bargaining, a union which represents the employees of a number of competing employers in a particular geographic region could strike a single employer while permitting that employer's competitors to continue to operate. However, in a multiemployer bargaining setting, the potential use of whipsaw tactics by the union is thwarted, since the nonstruck members of the bargaining association can lock out their employees, *see NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 97, and all members of the association can hire temporary replacements for their struck or locked-out employees. *See NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); *NLRB* v. *Brown*, 380 U.S. 278, 283 (1965).

Conversely, multiemployer bargaining permits a union to conserve its own scarce resources as well as effectuates a standardization of wages, benefits and working conditions within an industry.[4] Moreover, multiemployer bargaining facilitates

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[2] Herold, *Multiemployer Bargaining And The Whipsaw Strike: The Use Of A Lockout As An Economic Weapon*, 21 Brooklyn Bar. 54, 54-55 (1969).

[3] As one commentator has noted, multiemployer bargaining has become a defensive technique for small businessmen against the demands of strengthened unions. Comment, 66 Harv. L. Rev. 886, 886-887 (1953).

[4] Herold, *Multiemployer Bargaining And The Whipsaw Strike: The Use Of A Lockout As An Economic Weapon*, 21 Brooklyn Bar. 54, 54-55 (1969); Comment, 66 Harv. L. Rev. 886, 887 (1953).

the adoption of industry-wide benefits such as jointly-managed pension and welfare plans (*see* P. 21). Accordingly, multiemployer bargaining, in certain contexts, clearly is favored by both labor and management.

More importantly, multiemployer bargaining, as noted by this Court, *see NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95, has been recognized by Congress as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." Thus, during the Taft-Hartley amendments debate, Congress extolled the virtues of multiemployer bargaining, stating at one point the following:

> Because numerous employers are covered by a single collective bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaneously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

93 Cong. Rec. 4030-4031 (1947) (remarks of Senator Murray).

However, the continued vitality of multiemployer bargaining rests on the willingness of the Board and the courts to restrict severely the rights of parties to withdraw from such bargaining once undertaken.[5] "From the standpoint of a

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[5] As the Sixth Circuit stated in *Detroit Newspaper Publishers Assoc.* v. *NLRB*, 372 F.2d 569, 572 (6th Cir. 1967):

> Thus, while fear of being "locked in" a unit might discourage entrance by a union as the Board has argued, it must be equally clear

participating employer, it is crucial that the multiemployer group be held together. Otherwise, the goal of multiemployer bargaining will be defeated."[6] Similarly, it is critical to the union that the multiemployer group be maintained, since it has sacrificed certain economic leverage to obtain standardized benefits.

In this regard, a union, absent multiemployer bargaining, can exert crippling leverage on a single employer by striking that employer while permitting his competitors to continue to operate. The union, however, relinquishes this leverage when it consents to multiemployer bargaining, since the association members, by employing such techniques as the lockout, may operate as a group to ensure that none of its members are placed in a competitive disadvantage if the union engages in selective strikes. In turn, a businessman gives up certain elements of his economic independence to obtain protection from potential whipsaw tactics by the union and to ensure ultimate competitive wage and benefit parity. Accordingly, since multiemployer bargaining is based, to a certain extent, on sacrifice and compromise, it is a fragile concept that will be abandoned by both sides if the benefits of same cannot be ensured.

For example, a union, in the context of multiemployer bargaining, engages in a selective strike against one member of the association after a bargaining impasse has been reached. The other association members, as businessmen, most likely would choose to continue to operate with their normal work-

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that a virtually unfettered right of withdrawal, even if available to both sides in parity, might also destroy the attractiveness of such arrangements. The Board might well find that the instability resulting from such conditions has undermined the multi-employer unit as an effective tool of labor relations.

[6] Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 50 (1977).

force. However, the other association members nevertheless choose to lock out their union employees to ensure the integrity of the multiemployer unit by protecting the competitive position of the struck member. The result is that the union's potential economic leverage is minimized or eliminated. Subsequently, the struck member of the bargaining association, while under the protective umbrella of the association-wide lockout, hires permanent replacements for its striking union members and then withdraws from the association with the obvious belief that it can arrive at either a more favorable deal or no deal at all with the union, and with the knowledge that it no longer needs the protections which the association afforded it during the selective strike.

Unquestionably, the above scenario is antithetical to the continued viability of multiemployer bargaining. Thus, despite assuming economic loss to protect a struck member, the nonstruck members of the association have lost bargaining leverage and the prospect of competitive wage and benefit parity within their geographical area. In turn, the union has lost the fundamental bargaining leverage of a strike without obtaining the benefit of standardized wages and benefits. Surely, in light of the above, the parties must be reluctant to engage again in multiemployer bargaining.

Recognizing the inherently fragile nature of multiemployer bargaining and the devastating effect an employer's nonconsensual withdrawal can have on same, the Board in *Retail Associates, Inc.*, 120 NLRB 388 (1958), established restrictive guidelines for withdrawal from a multiemployer bargaining unit. Pursuant to those guidelines, withdrawal by an individual employer or union with respect to one or more employers is allowed prior to the start of negotiations only if adequate written notice is given. Once negotiations begin, a party may withdraw only in cases of mutual consent or "unusual circumstances." The Board's use, in general, of restrictive withdrawal guidelines has enjoyed wide acceptance among the reviewing courts. *See, e.g., Carvel Co.* v. *NLRB*, 560 F.2d 1030

(1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *NLRB* v. *Paskesz*, 405 F.2d 1201 (2d Cir. 1969); *NLRB* v. *Dover Tavern Owners Assoc.*, 412 F.2d 725 (3d Cir. 1969); *McAx Sign Co.* v. *NLRB*, 576 F.2d 62 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *NLRB* v. *Sklar*, 316 F.2d 145 (6th Cir. 1963); *NLRB* v. *Brotherhood of Teamsters, Local No. 70*, 470 F.2d 509 (9th Cir. 1972), *cert. denied*, 414 U.S. 821 (1973); *NLRB* v. *Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55 (10th Cir. 1966).

In applying the "unusual circumstances" exception to the withdrawal prohibition, the Board consistently has permitted nonconsensual withdrawal only when an employer member is experiencing severe economic distress — *see, e.g., Atlas Electrical Service Co.*, 176 NLRB 827 (1969); *Spun-Jee Corp.*, 171 NLRB 557 (1968); *U.S. Lingerie Corp.*, 170 NLRB 750 (1968) — or when consensual employer withdrawals have fragmented the multiemployer unit. *See, e.g., Connell Typesetting Co.*, 212 NLRB 918 (1974).

In the instant case, Bonanno attempted to validate its withdrawal from the Association based on the existence of a bargaining impasse. The Board, however, determined that a bargaining impasse, standing alone, is not an "unusual circumstance" within the meaning of *Retail Associates, Inc.*, and, thus, not an appropriate basis for violating the integrity of the multiemployer unit. This Court is asked herein to determine whether the Board's judgment and decision on the impasse question should be supported.

As such, the instant case implicates two fundamental policy issues. The first issue is whether the decision of the Board, as enforced by the First Circuit Court of Appeals, will effectuate the continued viability of multiemployer bargaining. The second issue is whether the Board's judgment in areas of national labor policy and, particularly, in matters relating to multiemployer bargaining, is entitled to meaningful deference, or whether reviewing courts simply may substitute their judgment for that of the Board under the guise of exercising the limited judicial review permitted by this Court.

A. *The Decision of the National Labor Relations Board, as Enforced by the First Circuit Court of Appeals, will Effectuate the Continued Viability of Multiemployer Bargaining.*

At the outset, it is important to note that the facts of the instant case raise only the question of whether nonconsensual withdrawal rights accrue upon the reaching of an impasse in the context of multiemployer bargaining, and *not* the broader question of whether a party may withdraw from multiemployer bargaining given the existence of both a bargaining impasse and the negotiation of interim agreements. Thus, while the Board (*see* P. 42-51) and the First Circuit, *see* 630 F.2d 25, 30-33 (P. 26-33), discuss an employer's withdrawal rights if interim agreements have been negotiated after a bargaining impasse has been reached, both the Board[7] and the First Circuit[8] found that in the instant case no interim agreements were made or even attempted. Accordingly, for purposes of determining whether the decision of the Board will effectuate the continued viability of multiemployer bargaining, this Court need only address so much of that decision which deals solely with the impact of a bargaining impasse.

An "impasse" has been defined in various ways. For example, as pointed out by the First Circuit below, *see* 630 F.2d at 34 n.24 (P. 35 n.24), an "impasse" is often defined as "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB* v. *Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). Similarly, an "impasse" has been defined as a situation in which "there was no realistic possibility that continuation of discussion at that time would have been fruit-

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[7] The Board found that "[i]n the instant case no interim agreements were made or even attempted" (P. 51).

[8] The First Circuit ruled that the negotiation of individual agreements "is absent in the present case; as the Board stated, 'no interim agreements were made or even attempted.'" 630 F.2d at 33 (P. 33); *see also* Circuit Judge Campbell's concurrence at 630 F.2d at 35 (P. 37).

ful." *Television Artists, Kansas City Local* v. *NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

However defined, it is evident that an impasse must be viewed as an expected part of negotiations especially in times of slow economic growth. Moreover, it is clear that the statutory duty to bargain in good faith does not require a party "to engage in fruitless marathon discussions at the expense of frank statements and support of his position." *NLRB* v. *American Insurance Co.*, 343 U.S. 395, 404 (1952). As a result, an impasse is not only an expected part of the negotiation process, but also often is arrived at early in that process. *See, e.g., Memorial Consultants, Inc.*, 153 NLRB 1, 15 (1965) (impasse reached at second meeting of the parties); *Midwest Casting Corp.*, 194 NLRB 523, 524-532 (1971) (impasse reached after one month and five meetings). Furthermore, as one commentator has stated, an impasse is "a fragile condition which may easily expire."[9]

Accordingly, linking a party's withdrawal rights to a common and temporary stage in normal collective bargaining would result in the "unusual circumstances" exception to the nonwithdrawal rule subsuming that rule and would make nonconsensual withdrawals from multiemployer bargaining commonplace. Since, as noted *supra*, the stability of multiemployer bargaining rests, in large part, on maintaining the integrity of the multiemployer group, the Board's refusal to permit nonconsensual withdrawal at impasse can only be viewed as effectuating the Congressional policy of continuing the viability of multiemployer bargaining.

In addition, a bargaining impasse not only is commonplace, but also clearly may be manipulated and created by an employer or union simply by the party's remaining steadfast in a position which is known to be unacceptable to the other party.[10] As stated by the First Circuit below, since "the Act

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[9] Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 17 (1977).

[10] *See* Comment, 17 B.C. Indus. & Comm. L. Rev. 525, 539-540 (1976).

expressly provides that the 'obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession[,]'" it is "within the power of an employer or union in many cases to cause a stalemate, as by adhering to a position known to be unacceptable to the other side." 630 F.2d at 34 (P. 35; citation omitted.) Thus, the practical effect of allowing withdrawal at impasse would be to sanction unfettered withdrawal rights — a policy which long ago was rejected by the Board as antithetical to the national policy of promoting multiemployer bargaining.

Finally, since the existence of an impasse depends on such varying factors as "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations," *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968), the determination of same is imprecise and time-consuming. As such, tying the right of withdrawal to impasse "can only lead to confusion concerning the rights of the parties," 630 F.2d at 34-35 (P. 35), and a concomitant reluctance by both businessmen and unions to engage in multiemployer bargaining.

In sum, maintenance of the integrity of multiemployer bargaining can only be achieved by severely restricting the nonconsensual withdrawal rights of the parties thereto. Permitting nonconsensual withdrawal at impasse would remove, in large part, any practical restrictions on a party's right to withdraw from multiemployer bargaining. Accordingly, since multiemployer bargaining has been recognized by Congress as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95, the Board's decision herein is consonant with Congressional policy and should be enforced.

B. *The First Circuit Court of Appeals Gave Appropriate Deference to the Policy Judgment Made by the National Labor Relations Board.*

This Court historically has recognized that the rights and responsibilities of employees, employers, and unions under the Act often must be determined through the process of balancing "conflicting legitimate interests." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96. In addition, this Court has stated that the "function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board subject to limited judicial review." *Id.*, *citing NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941).

This principle of judicial deference has been extended specifically by this Court to problems or questions arising in the context of multiemployer bargaining. Thus, this Court in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96, stated the following:

> . . . the compelling conclusion is that Congress intended "that the Board should continue its practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." (Citations omitted.)

This Court, however, has emphasized that a Board decision should be reviewed and set aside if the Board has usurped "major policy decisions properly made by Congress," *NLRB* v. *Brown*, 380 U.S. at 292, *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), with the result that its decision rests on an "erroneous legal foundation." *NLRB* v. *Brown*, 380 U.S. at 292, *quoting NLRB* v. *Babcock & Wilcox*, *supra*. Accordingly, the application conceptually of this

Court's judicial review standards in cases involving multiemployer bargaining issues requires that a reviewing court first determine the propriety of the legal foundation upon which the decision of the Board rests, and, thereafter, give the appropriate deference to the judgment of the Board unless that foundation is found to be erroneous, since Congress has entrusted to the Board the primary responsibility for balancing the legitimate conflicting interests which arise in the context of labor-management relations. The functional application of these judicial review standards is illustrated clearly by *NLRB* v. *Truck Drivers Local 449* and *NLRB* v. *Brown*.

In *Buffalo Linen Supply Co.*, 109 NLRB 447 (1957), the union alleged that the lockout of the union employees by the nonstruck members of a multiemployer bargaining association was in retaliation for the exercise by two employees of their protected right to strike and, therefore, violative of Section 8(a)(3) of the Act. The Board, however, ruled that the union's strike of one association member was an attempt "to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship," *id.* at 448, and concluded that the lockout was a permissible method of defending the integrity of the multiemployer bargaining relationship, despite its arguably adverse impact on the employees' protected right to strike. *See id.* at 448-449.

On review, the Second Circuit Court of Appeals concluded that the Board, in premising its decision on a desire to maintain the integrity of multiemployer bargaining, had usurped the power of Congress, since Congress had not expressed a clear opinion on multiemployer bargaining. *See Truck Drivers Local 449* v. *NLRB*, 231 F.2d 110, 117-118 (2d Cir. 1956). Accordingly, the Second Circuit rejected the legal foundation of the Board's decision and, thus, found no basis for the Board to engage in a balancing of interests. *See id.* at 118.

In *NLRB* v. *Truck Drivers Local 449*, *supra*, this Court disagreed with the Second Circuit's conclusion that the preservation of the integrity of multiemployer bargaining was not an

appropriate legal foundation for the Board's decision. Rather, the Court found ample support in the legislative history of the Taft-Hartley amendments for the policy of promoting stability in multiemployer bargaining. In this regard, this Court stated the following:

> At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.
>
> The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation.

353 U.S. at 95-96 (citations omitted).

Having concluded that the Board properly could balance the employees' right to strike against the preservation of the integrity of multiemployer bargaining, the Court then noted that Congress had left to the Board the primary responsibility for striking that balance and, therefore, adopted the balance struck by the Board. *See id.* at 96-97.

Thus, in reviewing the Board's decision in *NLRB* v. *Truck Drivers Local 449*, this Court examined the policy interests being balanced by the Board, and, having determined that those interests were valid, left to the Board the primary responsibility for striking the balance.

As noted *supra*, *NLRB* v. *Brown* also is illustrative of the functional application of the judicial review standards in cases involving multiemployer bargaining. In that case, the nonstruck members of a bargaining association were charged with violating Sections 8(a)(1) and (3) of the Act stemming from the lockout of their union employees and the hiring of temporary replacements. *See Brown Food Store*, 137 NLRB 73, 74 (1962). The Board found that the lockout did not serve to preserve the bargaining unit and concluded that the statutorily required antiunion motivation could be inferred from the actions taken by the nonstruck members and, thus, no evidence of a subjective intent to discriminate was necessary. *See id.* at 75. Accordingly, the Board, on balance, determined that the employees' right to be free from discriminatory conduct outweighed any incidental benefit which the lockout and hiring of temporary replacements might have had on furthering the stability of multiemployer bargaining. *See id.* at 75-77.

On review, this Court agreed with the appraisal of the Tenth Circuit Court of Appeals that the Board improperly concluded that the nonstruck association members' lockout of their union employees and the hiring of temporary replacements "carried its own indicia of unlawful intent." *NLRB* v. *Brown*, 380 U.S. at 282. As such, this Court ruled that the Board's decision had been based on "an erroneous legal foundation" and that, therefore, the balance struck by the Board could not be upheld. *Id.* at 292, *quoting NLRB* v. *Babcock & Wilcox*, *supra*.

In sum, in reviewing Board determinations involving issues arising in the context of multiemployer bargaining, this Court requires that the competing interests which are being balanced by the Board have a proper legal foundation; however, if it determines that such a foundation exists, this Court ensures that it is the Board and not the reviewing court of appeals which exercises the primary responsibility for striking the balance between those interests.

In the instant case, the Board, in effect, has balanced two different sets of "conflicting interests." First, the Board has balanced the preservation of the integrity of multiemployer bargaining against the "right" of an employer to unilaterally withdraw at impasse given that the Board has granted its imprimatur to the union's negotiation of interim agreements. This latter "right" had its origin in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975), where the Third Circuit Court of Appeals perceived that the Board's policies had provided unions with two economic weapons, *i.e.*, the selective strike and individual negotiations, while affording employers only the right of lockout.[11] The Third Circuit, accordingly, believed that employers must be accorded a second economic weapon, *viz.*, the right to withdraw from bargaining, and that this second weapon must "accrue simultaneously based upon the occurrence of an event which neither [the union or the employers] can manipulate (e.g., impasse)." *Id.* at 483.

Second, the Board has balanced the preservation of the integrity of multiemployer bargaining against the "rights" of those employer members of an association who have not negotiated interim agreements with the union after impasse. As noted above, the facts of the instant case do not implicate the second balancing undertaken by the Board, and, as such, the balance struck by the Board in that instance need not be reviewed by this Court herein.[12]

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[11] "The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)." 522 F.2d at 483.

[12] While not at issue in the instant case, the Board stated the results of its balancing of this second set of interests as follows:

> We have considered carefully the implications for multiemployer bargaining of interim agreements negotiated during impasse and conclude that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse. Interim agreements of the type deemed appropriate under our standards discussed *supra* are calculated to further, not destroy, unit integri-

As relates to the balancing of the first set of "conflicting interests," the Board first reaffirmed (*see* P. 41-42) its position set out in *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), *supplementing* 191 NLRB 244, *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), wherein it viewed an impasse as an expected part of negotiations which calls into play the use of economic weapons by both sides in an attempt to restart the flow of negotiations, and concluded that multiemployer bargaining, as a practical matter, would be destroyed if members of the unit were permitted to withdraw upon a bargaining impasse, since a member could then avoid his bargaining obligations by intentionally creating an impasse if an impending agreement was unfavorable.[13]

The Board, subsequently, addressed the alleged conflicting interest, which was perceived by the Third Circuit to be the imbalance of economic weapons, and concluded that, while the Third Circuit's perception of an imbalance of economic weapons itself was incorrect,[14] an alleged imbalance of econo-

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> ty inasmuch as they preserve a continuing mutual interest by all employer-members in a final associationwide contract. The provisions of the Act itself, rather than relative bargaining strengths, are the determinative factors in assessing the legality of particular forms of economic pressure (P. 51; footnote omitted).

[13] In this regard, the Board in *Hi-Way Billboards, Inc.*, stated the following:

> Were we to hold otherwise, we would be denying the practical reality of collective-bargaining negotiations, we would herald the demise of multi-employer bargaining, we would effectively negate the benefits of such bargaining to all parties and to the employees, and we would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impending agreement, as Hi-Way did in the instant case. Consequently, we hold that it would not effectuate the purpose or policies of the Act to allow an employer member of such an association to withdraw solely on the ground that an impasse in negotiations has been reached.

206 NLRB at 23.

[14] *See* Argument II, *infra*.

mic weapons is not a legitimate interest to be balanced against the national policy in favor of multiemployer bargaining (*see* P. 49-50). As such, the Board had little trouble in striking the balance and finding that an impasse alone does not form an adequate basis for a party's nonconsensual withdrawal from multiemployer bargaining. Specifically, the Board concluded that "[c]onsidering the facts as described above in footnote 2,[15] including the achievement of the multiemployer bargaining objective to continue the method of driver-pay on wage basis, and the supportive action that the lockout afforded the Respondent during the strike against it, we see no reason to allow the Respondent to withdraw from the multiemployer unit in untimely fashion" (P. 51).

As detailed above, the Board, by restricting unilateral withdrawal at impasse, clearly is effectuating the continued viability of multiemployer bargaining and, accordingly, the balance it has struck has a sound legal foundation. Therefore,

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[15] Footnote 2 of the board's decision provides as follows:

> The Respondent is in the business of laundering and renting uniforms and linens. It has been a member of the Group which has negotiated with the Union for several years. Before the last contract expired in April 1975, negotiations were duly opened for a new agreement and the Respondent authorized the Group to bargain in its behalf. The Respondent participated in the negotiations. Impasse was reached in May 1975 over whether the employees would be paid on a commission basis or remain on wages. Thereafter, in June 1975, the Union called a selective strike against the Respondent, and most of the Group responded by locking out their employees. After some 5 months during which the situation remained static, with all efforts to break the impasse failing, the Respondent withdrew from the Group. The remaining Group members then terminated the lockout and negotiations resumed with the Respondent absent. In April 1976, when the Union dropped its demand for compensation by commission, an agreement was reached. The Union thereafter informed the Respondent that it had not consented to the withdrawal and thus considered the Respondent bound by the terms of the agreement reached with the Group. The Respondent denied that it was bound and refused to execute the agreement (P. 38-39).

the Board's determination is entitled to deference under the standard of review enunciated by this Court.

Moreover, under the decisions of this Court, the balance could not have been struck in any other manner, since the asserted imbalance of economic weapons has been rejected by this Court as an appropriate concern for the Board. *See, e.g., NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490 (1960) ("Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union"); *NLRB* v. *Brown*, 380 U.S. at 283 ("We begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands'"); *American Ship Building Co.* v. *NLRB*, 380 U.S. at 317 (the Act does not "give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power").

Furthermore, the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F.2d at 483, itself recognized that "to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining." *See also id.* at 484, where the Third Circuit stated that "we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party."

Accordingly, even under the broadest standard of review, the Board's determination that an impasse alone does not justify unilateral withdrawal would be entitled to affirmance,

since there is no dispute that a contra determination would have frustrated national labor policy by creating instability in multiemployer bargaining, and since there can be no reasonable claim that the balancing of economic weapons is a legitimate conflicting interest. As such, it is beyond peradventure that the First Circuit herein gave appropriate deference to the Board's policy judgment.

II. The Decision of the Third Circuit Court of Appeals is Neither Persuasive Nor Consonant with the Standard of Review Articulated by This Court.

In applying its "unusual circumstances" guideline, the Board initially met with substantial resistance from a number of reviewing courts in decisions involving the existence of a bargaining impasse and/or the negotiation of interim agreements. *See Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972); *NLRB* v. *Hi-Way Billboards, Inc.*, 473 F.2d 649 (5th Cir. 1973); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Beck Engraving Co., supra*; *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979). At least in the case of *Fairmont Foods Co.* v. *NLRB*, the resistance can be traced to the failure of the Board prior to 1973 to articulate a consistent impasse doctrine in the multiemployer bargaining context.[16]

However, subsequent to the decision of the First Circuit herein, much of that early resistance has dissipated, as the Fifth Circuit has reconsidered its position taken in *NLRB* v. *Hi-Way Billboards, Inc.*, and has adopted the Board's present impasse doctrine, *see NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522, 526 (5th Cir. 1981); and the Eight Circuit has indicated that *Fairmont Foods Co.* v. *NLRB*, "can no longer be considered controlling" in that circuit. *Tobey Fine Papers*

[16] Comment, 17 B.C. Indus. & Comm. L. Rev. 525, 528-530 (1976).

v. *NLRB*, F.2d , , 107 LRRM 2221, 2222 n.3 (8th Cir. 1981).

In addition, as noted by the First Circuit below, *NLRB* v. *Associated Shower Door Co.*[17] and *NLRB* v. *Independent Association of Steel Fabricators, Inc.* "hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal." 630 F.2d at 33 (P. 33).

In this regard, in *Associated Shower Door*, negotiations between the union and the multiemployer association had reached an impasse, and the union had called a strike against all members of the association. Subsequently, individual agreements were reached between the union and several of the association members. Thereafter, several association members unilaterally withdrew from the multiemployer unit, although there was evidence that these members later rejoined the association. *Associated Shower Door Co., Inc.*, 205 NLRB 677, 679-80 (1973).

The majority of the Board concluded that the negotiating impasse coupled with the individual contracts did not justify the unilateral withdrawal of an association member and that in any case the actions of the respondent employers reestablished the agency relationships with the association. 512 F.2d at 677. In a concurring opinion Chairman Miller, while agreeing that the employers had rejoined the association, would have ruled that the making of individual agreements after an impasse is reached is sufficient justification for unilateral withdrawal. *Id.*

Enforcing the Board's order based on its finding that the employers had rejoined the association, the Ninth Circuit, noting the following, agreed with Chairman Miller's position:

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[17] The Ninth Circuit recently reaffirmed its holding in Associated Shower Door. *See H. & D, Inc.* v. *NLRB*, 633 F.2d 139 (9th Cir. 1980).

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. Pacific Coast Association of Pulp and Paper Manufacturers, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see* The Evening News Association, 154 N.L.R.B. 1494, 1495-1497 (1965), enforced sub. nom. Detroit Newspaper Publishers Association v. NLRB, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached *and* a union then engages in selective picketing *and enters into substantial individual agreements with employers who had been members of the multi-employer unit*, the withdrawal of *the remaining members of the unit*, if unequivocally communicated, should be permitted. *See* NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183-184 (5th Cir. 1974); Fairmont Foods Company v. NLRB, 471 F.2d 1170, 1172-1174, 1174 n.1 (8th Cir. 1972); Connell Typesetting Company, 212 N.L.R.B. No. 140 (1974).

512 F.2d at 232 (emphasis added).

Thus, in *Associated Shower Door*, it was the fact that the Board had allowed the union in that case to negotiate individually with the association members that persuaded the court to allow the respondent-employers to withdraw. This conclusion is supported by the fact that the Ninth Circuit cited the Board's decision in *Connell Typesetting Co.*, 212 NLRB 918 (1974), as support for its conclusion. *Connell Typesetting* was decided a year after the Board's *Associated Shower Door* decision and involved employer withdrawal from a multiemployer unit after selective strikes had been engaged in, and

individual interim agreements entered into. The Board in *Connell Typesetting* ruled that the union's extensive negotiation of interim agreements with employer members of the association justified unilateral employer withdrawal. *Id.* at 921.

Similarly, the union in *Steel Fabricators* had called a strike against all members of the multiemployer bargaining association after negotiations broke down. Thereafter, the union negotiated separately with four employer members of the association and, ultimately, nineteen members of the association unilaterally withdrew from multiemployer bargaining.

In reviewing that portion of the Board's decision which dealt with employer withdrawal rights at impasse, the Second Circuit indicated that determining such withdrawal rights involved the balancing of legitimate conflicting interests and acknowledged that the striking of that balance is entrusted primarily to the NLRB. However, the court, citing the individual negotiations, rejected the balance struck by the Board. In this regard, the court stated the following:

> That Local 455 agreed to negotiate separately with four former members of the Association during the August to January interval (Dextra, Atwater, North Shore, and Charla) is also indicative of the inability of the union and the Association to engage in fruitful discussion. Moreover, although the union did not selectively picket or otherwise pressure any particular member, its willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike. *Cf. N.L.R.B. v. Associated Shower Door, supra*, 512 F.2d at 232; *N.L.R.B. v. Beck Engraving, supra*, 511 F.2d at 482-83; *N.L.R.B. v. Hi-Way Billboards, supra*, 500 F.2d at 183.

582 F.2d at 147.

Accordingly, neither the decision of the Ninth Circuit nor that of the Second Circuit is inconsistent with that of the First Circuit herein, since same was premised on the existence of *both* a bargaining impasse *and* the negotiation of interim agreements. However, *NLRB* v. *Beck Engraving Co.* "is squarely on point, 630 F.2d at 33 (P. 33); but, as detailed below, that decision is neither persuasive nor consonant with the appropriate standard of review.

In *Beck Engraving*, the respondent-employer had withdrawn from the multiemployer bargaining association and later argued that (1) the resignation of its employees from the union, (2) the consent by the union to the withdrawal of another member of the unit, and (3) the instigation of the selective strike by the union against the respondent, represented "unusual circumstances" and thus justified its untimely withdrawal. *Beck Engraving Co.*, 213 NLRB 53, 54-55 (1974). The Board, however, rejected these facts as insufficient. The respondent subsequently moved to have the Board reconsider its decision, arguing that the parties had reached a bargaining impasse and that such an impasse constituted an "unusual circumstance." 522 F.2d at 478-479 & n.8. The Board denied this motion and sought enforcement of its order.

The Third Circuit denied enforcement of the Board's order. The court perceived that the Board, in the context of multiemployer bargaining, had permitted unions to engage in selective strikes and enter into interim agreements while only permitting employers to lock out their employees. As such, the Third Circuit believed that there existed an imbalance of economic weapons which justified "according the employer an equivalent right," *i.e.*, unilateral withdrawal at impasse. *Id.* at 483. Moreover, the court concluded that "[t]he employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements," rather, "[t]he rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., im-

passe)." *Id.* However, as pointed out by the First Circuit below, *see* 630 F.2d at 31-32 and 34-35 (P. 29-30, 34-36), and by certain commentators,[18] the reasoning of the Third Circuit is suspect.

First, this Court in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. at 488, restricted "any governmental power" from acting as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *Id.* at 497. Thus, this Court requires that the legitimacy of a bargaining tactic be determined isolated from any notion of relative bargaining strength and based on the pertinent statutory standard. The Third Circuit violated said requirement when it granted withdrawal rights based not on a thoughtful analysis of the Act, but, rather, on an assessment of the parties' relative bargaining position. This form of balancing improperly affects the substantive terms of the ultimate collective bargaining agreement — an effect denounced in *NLRB* v. *Insurance Agents' International Union*. *See id.* at 497-498.

Second, even if the Third Circuit's balancing of economic weapons was permissible conceptually, it was extremely imprecise. In this regard, in addition to the three "economic weapons" noted by the court, this Court permits, *inter alia*, (1) union harassing tactics while on the job, *see id.* at 490-492, (2) the struck members of an association to lock out their union employees and hire temporary replacements, *see NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345, (3) the non-struck members of an association to lock out their union employees and hire temporary replacements, *see NLRB* v. *Brown*, 380 U.S. at 283, (4) all association members to use the lockout offensively, *see American Ship Building Co.* v. *NLRB*, 380 U.S. at 318, (5) all association members to make unilateral

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[18] *See* Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 50-60 (1977); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 533-540.

changes in working conditions consonant with the offers the union has rejected, *see NLRB* v. *Katz*, 369 U.S. 736, 745 and n.12 (1962), and (6) all association members to blunt the effectiveness of an anticipated strike by stockpiling, readjusting schedules and transferring work. *See NLRB* v. *Brown*, 380 U.S. at 283. As such, the basic premise of the Third Circuit's decision, *i.e.*, an imbalance of economic weapons, is both conceptually and factually defective.

Third, the court's contention that a bargaining impasse cannot be manipulated ignores the present state of the law which permits "hard bargaining" and "provides a party with a means of withdrawing whenever the impending agreement proves objectionable." 630 F.2d at 34 (P. 35). Moreover, the Third Circuit's rationale that the "rights of the parties should accrue simultaneously," 522 F.2d at 483, is inconsistent with court-supported Board findings of "unusual circumstances" in situations other than those involving impasse.

Thus, for example, in *Spun-Jee Corp.*, 171 NLRB 557 (1968), the Board, after examining the *individual facts* of the case, concluded that the economic distress of the respondent-employer justified its unilateral withdrawal. *Id.* at 557-558. In that case there was no "simultaneous" occurrence of withdrawal rights of the employer and the union. In fact, the employer's withdrawal had no effect on the bargaining responsibilities of the union vis-a-vis the remaining association members.

Similarly, in *Connell Typesetting Co.*, *supra*, the Board found that the union had fractured the multiemployer unit by entering into interim agreements with one-half of the employers in the multiemployer unit. The Board then concluded that the union's action constituted "unusual circumstances" justifying the respondent-employers' withdrawal. 212 NLRB at 921. Clearly, in *Connell Typesetting* the employers' withdrawal rights were contingent upon the union's actions in entering into interim agreements. Thus, in that case, an employer's withdrawal rights were not based upon the occurrence of an event which neither could manipulate.

Accordingly, the analysis of the Third Circuit in *Beck* clearly is unpersuasive. Furthermore, that analysis ignores the standard of review articulated by this Court.

In this regard, the Third Circuit in *Beck* readily acknowledges that its decision "contributes to instability within the context of multi-employer bargaining" and, as such, is "unfavorable to the policy aimed at stabilization of [multiemployer] units." 522 F.2d at 483-484. However, the Third Circuit believes that the balance of "conflicting interests" must be struck in favor of remedying the perceived imbalance of economic weapons. Thus, even if the defects in the Third Circuit's analysis are overlooked, it is evident that the court has made itself primarily responsible for striking the balance between the conflicting interests "to effectuate national labor policy," *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96, and thereby has usurped the function of the Board, as delegated by Congress.

In sum, the decision of the First Circuit herein is in conflict with that of the Third Circuit in *Beck*. However, while the decision below is analytically sound, that of the Third Circuit is neither persuasive nor consonant with the standard of review enunciated by this Court.

Conclusion.

Multiemployer bargaining serves a vital national interest. Its preservation, however, is contingent on restricting severely a party's right to unilaterally withdraw from such bargaining once negotiations have commenced. An impasse is a common and temporary stage in normal collective bargaining and may be manipulated by a party. As such, linking a party's nonconsensual withdrawal rights to the existence of a bargaining impasse would make the maturing of such rights commonplace and would sanction unfettered withdrawals. Such a result would be antithetical to multiemployer bargaining and, in turn, to the national interest.

In the instant case, Bonanno participated in multiemployer bargaining as long as it served its own interest. In particular, Bonanno readily accepted the protective umbrella of the Association-wide lockout and only withdrew from the Association after it had hired permanent replacements for its striking employees, and thereby rendered unnecessary the protections available through the Association. Thus, the instant case represents a classic example of how multiemployer bargaining will be weakened or destroyed should this Court overrule the balance struck by the Board and find that a bargaining impasse, standing alone, justifies a party's unilateral withdrawal from multiemployer bargaining.

Accordingly, Respondent, Teamsters Local Union No. 25, respectfully urges this Court to affirm the decision of the First Circuit below.

Respectfully submitted,

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